

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
WMGO Broadcasting Corp., Inc.)	File No. EB-05-IH-0120
)	NAL Account No. 200732080019
Licensee of Station)	FRN No. 0008130353
WMGO(AM), Canton, Mississippi)	Facility ID No. 73259

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 2, 2007

Released: March 2, 2007

By the Chief, Investigations and Hearings Division:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("NAL"), issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Act"),¹ and Section 1.80 of the Commission's rules,² we find that WMGO Broadcasting Corp., Inc. (the "Licensee"), Licensee of Station WMGO(AM), Canton, Mississippi (the "Station"), apparently willfully violated Section 73.1206 of the Commission's rules,³ by recording a telephone conversation for broadcast, and later broadcasting that telephone conversation, without first informing the party to the conversation of its intention to do so.⁴ Based on our review of the facts and circumstances, we find WMGO apparently liable for a forfeiture in the amount of \$8,000.

II. BACKGROUND

2. The complainant, Luke Gordon (the "Complainant"), alleges that, on January 6, 2005, the Station recorded a telephone conversation between him and Jerry Lousteau, an on-air radio personality and news director of the Station, without notifying the Complainant of Mr. Lousteaus' intention to do so.⁵ The Complaint further alleges that the Station later broadcast excerpts of the recorded telephone conversation on January 7, 10, and 11, 2005.⁶ Specifically, the Complainant claims that, on January 6, 2005, he received a voice mail message from Mr.

¹ See 47 U.S.C. § 503.

² See 47 C.F.R. § 1.80.

³ See 47 C.F.R. § 73.1206.

⁴ See *id.*

⁵ See Electronic mail correspondence from Luke Gordon to Tom Hutton, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated January 7, and 12, 2005, (the "Complaint").

⁶ See *id.*

Lousteau asking him to return his phone call.⁷ When the Complainant phoned the Station moments after receiving the voice mail message, Mr. Lousteau identified himself, and asked the Complainant to tell him about a news matter the Station was investigating.⁸ According to the Complainant, Mr. Lousteau never informed him that their conversation was being recorded, and never obtained the Complainant's consent to broadcast the conversation. On January 7, 2005, the Complainant discovered that the Station had recorded his conversation with Mr. Lousteau and had broadcast portions of the taped conversation that morning. On January 12, 2005, the Complainant contacted us again to let us know that the Station also aired portions of the taped conversation on January 10, and 11, 2005.⁹

3. After reviewing the Complaint, we issued a letter of inquiry (the "LOI") to the Licensee, asking whether the Station recorded a January 6, 2005, conversation between the Complainant and Mr. Lousteau and whether the Station broadcast all or portions of the taped conversation on January 7, 10 and 11, 2005.¹⁰ We inquired whether the Station's personnel gave the Complainant prior notice that the Station intended to record and broadcast the conversation, and directed the Licensee to provide tapes and transcripts of any such recorded conversations and broadcasts.¹¹ Finally, we instructed the Licensee to serve a copy of its response to the LOI ("LOI Response") on the Complainant.¹²

4. In its June 15, 2005, LOI Response, the Licensee responds that Mr. Lousteau initiated a phone call to the Complainant on or about January 6, 2005, to interview him.¹³ The Licensee, however, states that Mr. Lousteau was unsuccessful in contacting the Complainant, "so there was no need and no opportunity to inform him, in person, of [the Station's] intentions to record and/or broadcast" the conversation.¹⁴ The Licensee asserts that, consequently, there were "no transcripts or recordings to provide" to the Commission.¹⁵

5. Shortly after the Commission received the LOI Response, the Complainant sent us an audiotape recording, which contained a portion of the telephone conversation that was aired by the Station.¹⁶ In light of this development, we issued a follow-up LOI ("Second LOI"), which directed the Licensee to confirm the authenticity of the content of the audiotape recording, and to

⁷ *See id.*

⁸ *See id.*

⁹ *See id.*

¹⁰ *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to WMGO Broadcasting Corp., Inc., dated June 29, 2005 at 4 (the "LOI").

¹¹ *See id.* at 4-5.

¹² *See id.* at 6.

¹³ *See* Letter from Jerry Lousteau to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated July 18, 2005 at 1 ("Response").

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See* Letter from Luke Gordon to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated July 20, 2005.

identify the persons whose voices are heard on the tape.¹⁷ We also instructed the Licensee to review its initial LOI Response and make any revisions that it believed were necessary.¹⁸ In its Second LOI Response, the Licensee confirmed the authenticity of the audio recording as a telephone conversation aired by the Station, and identified the two speakers as Mr. Lousteau and the Complainant.¹⁹ The Licensee did not, however, affirmatively respond to the Commission's question as to whether the Station had informed the Complainant of its intention to record and/or broadcast the telephone conversation.²⁰ Instead, the Licensee stated that because the Complainant had participated in previous telephone interviews that were recorded and subsequently broadcast by the Station, the Licensee "can only surmise that [the Complainant] has always been aware of the taping for broadcast."²¹

III. DISCUSSION

6. Under Section 503(b)(1) of the Communications Act of 1934, as amended (the "Act"), any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty. In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed. The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule. As we set forth in greater detail below, we conclude under this standard that the Station is apparently liable for a forfeiture for its apparent willful violation of Section 73.1206 of the Commission's rules.

7. Section 73.1206 of the Commission's rules requires that, before broadcasting or recording a telephone conversation for later broadcast, a licensee must inform any party to the call of its intention to broadcast and/or record the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast.²² The Commission will presume such awareness only where the "other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations."²³

¹⁷ See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to WMGO Broadcasting Corp., Inc., dated January 17, 2006 (the "Second LOI").

¹⁸ See *id.* at 1.

¹⁹ See Letter from Jerry Lousteau to Tom Hutton, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 3, 2006 (the "Second LOI Response").

²⁰ The Commission's LOI, which is incorporated by reference in the Second LOI, requires the Licensee to "[s]tate whether the Licensee informed Mr. Gordon of its intention to broadcast such telephone conversation live over Station WMGO(AM) and/or to record such conversation for later broadcast prior to its doing so. If not, explain why." See LOI at 4.

²¹ *Second LOI Response* at 1.

²² See 47 C.F.R. § 73.1206.

²³ *Id.*

8. The purpose of Section 73.1206 is to protect “the legitimate expectation of privacy in connection with the broadcast use of telephone conversations.”²⁴ Here, the Station admits that it “initiated” the phone call to the Complainant on January 6, 2005, “with the intent of recording and/or broadcast[ing]” the conversation.²⁵ The Licensee argues that, since no one spoke to the Complainant during the initial call, which resulted in the voice mail message, “there was no need and no opportunity to inform him, in person, of our intentions to record and/or broadcast” the conversation.²⁶ When the Complainant returned the phone call that same day, however, the Station failed to inform him of its intention to record and broadcast the telephone conversation. The record establishes that the Complainant was neither aware nor informed that the conversation would be recorded and aired, and the Station has submitted nothing to the contrary in either of its two responses.

9. The Licensee acknowledges that it had an obligation to inform the Complainant of its intention to record and broadcast the conversation upon initiating the telephone call, however, it argues that such responsibility is abrogated when the caller returns a call initiated by the licensee.²⁷ We disagree. We do not presume, nor may the Licensee presume, that the caller in this case had knowledge of the Licensee’s intent to record the call for broadcast merely because he returned a phone call that Mr. Lousteau initiated.²⁸ In returning the phone call, the Complainant was contacting Mr. Lousteau, and not a live call-in or “open mike” show, where he could expect to have his discussion broadcast and/or simultaneously recorded.²⁹ Moreover, the Complainant had no association with the Station. Thus, the limited exception to the general notice requirement of Section 73.1206 is not applicable. To the extent that Mr. Lousteau may have conducted similar phone interviews with the Complainant in the past and recorded or broadcast such interviews, such interviews were presumably accompanied by notification of the Station’s intention to record and/or broadcast the conversations.³⁰ Even if such notifications were given in prior telephone conversations with the Complainant, however, that would not excuse the failure to give notice in this instance.³¹ We find, therefore, that the Licensee apparently violated

²⁴ *Amendment of Section 73.1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463 (1988).

²⁵ See LOI Response at 1.

²⁶ See LOI Response at 1.

²⁷ See Second LOI Response.

²⁸ See *KOFI, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 5995, Forfeiture Order, 2005 WL 3057504 (finding that a licensee violated the telephone broadcast rules when it aired a phone conversation initiated by a caller, who called to complain about activities occurring outside of the studio, and did not call for the purpose of talking to on-air personnel and having conversation broadcast); see also *Entercom New Orleans License, LLC*, 17 FCC Rcd 2160 ¶ 6, *Erratum*, 17 FCC Rcd 6624 (2002) (finding that a licensee’s on-air personality could not reasonably have presumed that a caller who dialed the wrong number and erroneously spoke to an on-air personality was aware that the call was being broadcast or recorded for broadcast).

²⁹ See *In the Matter of Amendment of Part 73 of the Commission’s Rules and Regulations with Respect to the Broadcast of Telephone Conversations*, 23 F.C.C. 2d 1, at 2, ¶ 5, Report and Order, (1970) (finding that consent will be presumed from surrounding circumstances where a caller initiates a telephone call to an “open mike” show, during which phone conversations are customarily broadcast).

³⁰ See LOI Response at 1; see also Second LOI Response.

³¹ See *Amendment of Section 1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463-64 (1988) (“1988 Order”); 1972 Public Notice, 35 FCC 2d at 941; *Amendment of Part 73 of*

Section 73.1206 by failing to inform the Complainant that the conversation was to be broadcast or recorded for later broadcast.

IV. PROPOSED FORFEITURE

10. Based on the material before us, it appears that the Licensee willfully and repeatedly violated Section 73.1206 of the Commission's rules, by airing the subject telephone conversation on January 7, 10 and 11, 2005.³² The Commission's forfeiture guidelines establish a base forfeiture amount of \$4,000 for the unauthorized broadcast of a telephone conversation,³³ and provide that base forfeitures may be adjusted based upon consideration of the factors enumerated in Section 503(b)(2)(D) of the Act,³⁴ and Section 1.80(a)(4) of the Commission's rules,³⁵ which include "the nature, circumstances, extent, and gravity of the violation . . . and the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."³⁶ The record reflects that the Licensee aired the conversation on at least three separate occasions, January 7, 10 and 11, 2005. Therefore, we believe that an upward adjustment of the base forfeiture amount is appropriate,³⁷ and propose a forfeiture of \$8,000.

IV. ORDERING CLAUSES

11. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,³⁸ and Sections 0.111, 0.311, and 1.80 of the Commission's rules that WMGO Broadcasting Corp., Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of \$15,000 for willfully and repeatedly violating Section 73.1206 of the Commission's rules.³⁹

12. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules that within thirty (30) days of the release of this Notice, WMGO Broadcasting Corp., Inc.

the Commission's Rules and Regulations with Respect to the Broadcast of Telephone Conversations, Report and Order, 23 FCC 2d 1, 2 (1970); *see also EZ Sacramento, Inc. and Infinity Broadcasting Corporation of Washington, D.C.*, Memorandum Opinion and Order, 16 FCC Rcd 4958, 4958 (2002) (finding that prior telephone notifications and consent "effectively cease" when callers are placed on hold and are unaware that their private conversations are secretly being broadcast; thus, explicit notice must be re-given if a station plans to continue such broadcasts or record such conversations for later broadcast); *Heftel Broadcasting-Contemporary, Inc.*, Memorandum Opinion and Order, 52 FCC 2d 1005, 1006 (1975) (finding that "cash call" promotions that simultaneously broadcast and award prizes based on parties' responses in answering the telephone are subject to the prior notification requirement of Section 73.1206).

³² See 47 C.F.R. § 73.1206.

³³ See 47 C.F.R. § 1.80(b)(4). *See also Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Memorandum Opinion and Order, 12 FCC Rcd 17087, 17113 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("Forfeiture Policy Statement").

³⁴ See 47 U.S.C. § 503(b)(2)(D).

³⁵ See 47 C.F.R. § 1.80(a)(4).

³⁶ See 47 C.F.R. § 1.80(b)(4) at note. *See also Forfeiture Policy Statement* at 17100-01.

³⁷ *See, Scripps Howard Broadcasting Company*, Notice of Apparent Liability for Forfeiture, DA 05-60 (Inv. & Hrg. Div., rel. January 13, 2005).

³⁸ See 47 U.S.C. § 503(b).

³⁹ See 47 C.F.R. § 73.1206.

SHALL PAY the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture must be made by mailing check or similar instrument, payable to the order of the Federal Communications Commission. The payment **MUST INCLUDE** the FCC Registration Number ("FRN") and the NAL/Account Number specified in the caption of this NAL. Payment by check or money order may be mailed to the Federal Communications Commission, P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 9116229.

14. The response, if any, must be mailed to Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington, D.C. 20554 and **MUST INCLUDE** the NAL/Account Number referenced above.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. Requests for payment of the full amount of this NAL under an installment plan should be sent to the Deputy Chief Financial Officer, Room 1-A637, 445 12th Street, S.W., Washington, D.C. 20554.⁴⁰

17. **IT IS FURTHER ORDERED** that the complaint filed by Luke Gordon **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED**, and the complaint proceeding **IS HEREBY TERMINATED**.⁴¹

18. **IT IS FURTHER ORDERED THAT** copies of this **NOTICE OF APPARENT LIABILITY** shall be sent by Certified Mail - Return Receipt Requested to WMGO Broadcasting Corp., Inc., 360 North Liberty Street, Canton, Mississippi 39046, and to Mr. Luke Gordon, 257 Glenfield, Canton, Mississippi 39046.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro,
Chief, Investigations and Hearings Division
Enforcement Bureau

⁴⁰ See 47 C.F.R. § 1.1914.

⁴¹ For purposes of the forfeiture proceeding initiated by this NAL, **WMGO Broadcasting Corp., Inc.** shall be the only party to this proceeding.